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**VALS' submission to the Department of Justice in response to the proposed
Justice Statement 2 - sent 28 May 2008**

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INTRODUCTION

This submission attempts to consolidate the following relevant submissions that VALS has produced:

- A Fairer Victoria for Indigenous Communities: A Framework for Action. A Proposal for building the capacity of community-controlled Aboriginal organisations in Victoria. Prepared in October 2006 (joint publication with 4 other peak/Statewide Indigenous Australian organisations).
- VALS' submission to the Department of Justice in response to the Equal Opportunity Review Discussion Paper – 14th January 2008
- VALS' Public Hearing submission to the Parliament of Victoria Law Reform Commission in response to 'Alternative Dispute Resolution Discussion Paper September 2007' on Monday 25th February 2008.
- In Search of Justice: Exploring Alternative Justice Responses in the Victorian Indigenous Australian Community - by Nicole Bluett-Boyd (Department of Criminology, University of Melbourne, 2005).

If you wish to receive the full version please contact VALS. VALS consolidates the submissions by classifying information under the following theme headings:

- Substantive equality
- Choice
- 'smart on crime' approach
- Indigenous Australian input/dialogue

This submission provides specific recommendations in line with the above themes in relation to the following themes which were indicated as priorities of the Justice Statement 2 at the Community Legal Centre meeting with Attorney-General, Mr Rob Hulls on 28th April 2008:

- Community Engagement
- Alternative Dispute Resolution
- Restorative Justice
- Modernising Justice.

THEMES OF VALS' SUBMISSIONS

The following themes are repeated in VALS' submissions and VALS suggests that space should be created for positive initiatives that can originate from consideration of these themes. It is noted that some of the themes overlap. In order to achieve community engagement there is need for affirmative actions motivated by substantive equality, such as the establishment of the Koori Courts.

VALS argues that all Indigenous Australians should have choice and so have access to measures that attempt to achieve substantive equality. VALS also argues that recognition of the value of

Indigenous Australian input and the consequential dialogue with Indigenous Australian is an example of a way to achieve substantive equality and community engagement. A means of achieving this is to develop partnerships with Indigenous Australians, such as Indigenous Australian input on a Government consultation strategy that achieves consolidation of consultation processes.

Substantive equality

There is risk of a parallel “injustice plan” if the Justice Agreement fails to build adequate support for respect of difference and equity. Such failure has the potential to result in institutional or systemic racism. There is a difference between formal and substantive equality as the former assumes everyone is equal and the latter does not and so leads to affirmative action.

Choice

There is need for both formal and substantive equality. There is need for both specific Indigenous Australian services and mainstream services. Most Indigenous Australians prefer to access Indigenous Australian specific services. However, some choose to access mainstream services as they prefer privacy and go to a service where no-one who works there knows them.

‘Smart on crime’ approach

A “smart on crime” approach is more appropriate given the shortcomings of a ‘tough on crime’ approach. A “smart on crime” recognises these shortcomings and tries to address them. There is risk of a parallel “injustice plan” if the Justice Agreement subscribes to the mentality that a tough on crime approach is appropriate. A tough on crime approach results in a growth in the prison population and harsh laws and sentences. A ‘smart on crime’ approach, which VALS prefers, recognises that sentencing rates are increasing ahead of crime rates. A ‘smart on crime’ approach is critical of the sensationalist and punitive treatment of justice issues by the media. The media tells the community that systemic disadvantage is the fault of the individual and that the solution to crime is more punishment. A ‘smart on crime’ recognises the need to address systemic disadvantage which often is the underlying cause of crime.

Indigenous Australian input/dialogue

There is need to utilise Indigenous Australian knowledge in the development of the justice system, ADR models and restorative justice models. This is in light of the fact that Western based systems are alienating to Indigenous Australians which creates problems of access.

Indigenous Australian opinions should be valued as Indigenous Australians are experts of issues that involve them. Programs work better if Indigenous Australians are involved at the beginning and have ownership. There is a need for a culturally inclusive approach at the beginning of a decision making process. Too often Indigenous Australians are involved in processes when decisions have already been made and at this stage of the process all that is offered is tokenism.

THEMES OF JUSTICE AGREEMENT

Listed below are some specific applications of the themes of VALS' submissions listed above to the following themes of the Justice Statement that were mentioned at the Community Legal Centre meeting on 28th April 2008:

- Community Engagement;
- Alternative Dispute Resolution;
- Restorative Justice;
- Modernising Justice.

1. COMMUNITY ENGAGEMENT

Substantive Equality/Choice

The issues raised below relate to substantive equality and choice.

VALS agrees that the Justice Statement should be concerned with community engagement with the Court system. VALS suggests that the Court system would be more accessible to the Indigenous Australian community if the following were rolled out and available to all:

Indigenous Community Engagement Officer

This role is currently only provided at the Dandenong Magistrates' Court. Data indicates the success of this role as the number of Indigenous Australians assisted in the last three months is 48. This number is striking given that Court data only recorded 17 Indigenous Australians using the Court in 2007.

Aboriginal Liaison Officers

This role is only available in the mainstream criminal courts at Melbourne Magistrates' Court. Such a role should be provided in all Courts, such as Family Courts. VALS argues that there should be more than one Aboriginal Liaison Officer at Melbourne Magistrates' Court.

Koori Courts

This Court is not available to all because some do not live in the right postcode. The Koori Court option should be available to all Indigenous Australians.

Diversion

Diversion options that are available at some Courts is not available at others which should be rectified. Also, mainstream diversion programs are not accessible to Indigenous Australians and engagement with diversion should be improved. It is for this reason that VALS undertook the Koori Youth Cautioning Pilot.

Community Legal Education

Community engagement could be better fostered if VALS has more capacity to provide community legal education that included a legal clinic. Community education campaigns should have the following attributes:

- **Targeted:** the usefulness of this characteristic is that the content/structure is relevant and engaging.
- **Regular information sessions:** which is important to gain trust and respect.
- **Flexible and informal structure:** which allows for interaction between participants and information session facilitators/other professionals and avoid information overload (ie: case scenarios as opposed to powerpoint presentation).
- **Refreshments and entertainment provided as a draw card:** which makes it more likely that individuals will attend (ie: singer, dance class or role model visit).
- **Handy and desirable education materials to take home at each session:** which means that information conveyed at the information session will infiltrate every day life. For instance, the primary use of a mug is to drink from it and a secondary purpose can be to convey a legal tip that is printed on it.
- **Accessible venue:** the usefulness of an accessible venue is that Indigenous Australians feel comfortable. The information should be accessible so in plain English.
- **Two-way Communication:** framework which values two way communication between Aboriginal service providers and community members;

Lay Representation

Community engagement could be better fostered if lay representation was available as is the case for Indigenous Australians in the Magistrates' Court of Western Australia. The Aboriginal Legal Service of Western Australia trains its Court Officers on-site for 6 weeks. This suggestion is in recognition of the low number of Indigenous Australian lawyers.

In Western Australia, s 48 (Right of representation in proceedings) of the Aboriginal Affairs Planning and Authority Act 1972 states: *Any person generally or specifically authorised in writing by the Minister for that purpose may in any legal proceedings in any court to which a person of Aboriginal descent is a party, or in which a person of Aboriginal descent is indicted for or charged with any crime or offence, address the court or the jury on behalf of that person and examine and cross-examine witnesses. [Section 48 amended by No. 121 of 1984 s. 35; No. 57 of 1997 s. 14; No. 34 of 2004 s. 251; No. 70 of 2004 s. 82.]*

VALS' Equal Opportunity Recommendations

The following recommendations in VALS' submission in response to the review of the Equal opportunity Act relate to substantive equality and choice in order to achieve community engagement:

1. Dialogue: *engage in a cross sectoral/cross department dialogue to develop an operational and practical implementation plan to increase awareness of substantive equality dialogue (see Indigenous Australian input/dialogue below).*

2. Holistic: *implement allied steps to address systemic discrimination as it likely that steps in isolation will have a limited impact.*
3. Cultural security: *Adopt a cultural security framework (A cultural security approach is a holistic approach in that it prompts reconsideration of systemic and organisational values and practices and goes beyond simple cultural awareness training etc).*
4. Advocacy: *Provide an advocacy service which has the following attributes:*
 - a. *Ongoing support: advocacy should cover what to do about discrimination as well as during and after the EOHR process.*
 - b. *Training: Provide training to community based advocates.*
 - c. *Community-based advocacy and uses locally available skilled and culturally appropriate advocacy (ie: Koori input).*
5. Use data as tool: *use data as a advocacy tool relating to systemic discrimination*
6. Fast-tracking: *Eligibility for the fast-tracking process should be based on the urgency.*
7. Legal advice: *The fast tracking model should include within it some process for providing legal advice to the complainant*
8. *There should be a choice for Indigenous Australians to use the mainstream process in the EOHR or a process targeted at Indigenous Australians.*

Indigenous Australian input/dialogue

Recognition of the value of Indigenous Australian input and the consequential dialogue with Indigenous Australian is an example of a way to achieve substantive equality and community engagement.

A Fairer Victoria

The ‘A Fairer Victoria Framework’, a document that VALS collaborated on with other Indigenous Australian organisation provides key principles considered crucial to building effective partnerships with Indigenous communities The framework views Indigenous Australian organisations as key stakeholders in the work of improving outcomes and increasing opportunities for Indigenous people. It suggests that for the government to expand its capacity to work effectively with communities, it is necessary to build the capacity of Indigenous community-controlled organisations.

The framework recommends the following that will enable Indigenous Australian input and dialogue:

1. The State Government increase funding for Indigenous organisations to develop policy, research and program delivery capacity. Funding should be provided for each of the five peak and statewide Indigenous Australian organisations to employ a Senior Project Officer and a Junior Project Officer
2. The Government provide funding for an annual Indigenous sector joint forum to develop an annually updated framework for culturally inclusive policy.

3. The Government meet with Indigenous Australians quarterly to discuss consultation strategies, timing of consultation and possible integration and synergies to help minimise community consultation fatigue.
4. The State Government, in consultation with Indigenous statewide and peak organisations develop clear and equitable partnership protocols for engagement on issues concerning our areas of expertise. For instance, the Government needs to ensure that Indigenous Australian organisations are adequately supported to provide cultural awareness training to others.

VALS' submission re Justice Statement 1

VALS wishes to expand upon suggest 3 because it was outlined in detail in VALS submission in response to Justice Statement 1. VALS suggested the following strategic approach, to improving the justice system. VALS' submission can be summarised as follows

- An annual consultation plan would enable duplication of issues to be minimised and give some clarity to community organisations and members about what was happening and when.
- A non legally binding commitment could enable some better inter and intra department collaboration processes to be trialled as well as a more integrated community consultation approach.
- Only the most urgent pieces of legislation may be fast-tracked while the issues with high rights impacts should go through a slower more inclusive process of law reform and policy change.

VALS Recommendations to the Implementation review of RCIADIC Recommendations

The Justice Plan should be in line with the recommendations of the Royal Commission into Aboriginal Deaths in Custody. The following recommendations from VALS submission (2005) to the Implementation review of RCIADIC Recommendations highlight the need for Indigenous Australian input. The recommendations relate to a co-ordinated consultation process also:

- Consultation with the community generally and Indigenous Australian communities in particular should be subject to a set of policy guidelines which recognise the value of consultation, the different forms it may take, time frame and structures which may be employed, the need for standards in relation to size and complexity of written material provided, time frames and the need to provide feed back. There needs to be community input to these guidelines.
- Attention should be given to key State Government Departments, non-Government organisations and semi Government Departments developing a forward plan to attempt to consolidate and integrate attempts to consult Indigenous Australians on an annual basis. This would help avoid duplication, poor levels of response to surveys and consultation and the complaint that research and consultation information doesn't go anywhere. Indigenous Australians must be employed to help do this and RAJACS and other groups could also assist. This could mean that several times a year there is a systematic consultation cycle involving visits to communities to gather information on highly contentious or highly significant policy, program or justice related issues. Other matters might be researched via phone calls using already existing networks and organisations.

- There is need for a more comprehensive Government commitment to reducing systemic disadvantage using a range of strategies. A subset of this policy would be promoting awareness that disadvantaged groups and minority group's views and interests should be respected and listened to.
- Any proposed new legislation should, prior to development, be subject to an analysis by people with Indigenous, non-Indigenous and academic perspectives of its impact on Koorie people. The analysis could encourage things such as alternatives to legislation to be considered, how consistent the proposed legislation was with other legislation, capacity of the legislation to cause confusion, ambiguity and cost, impact on other disadvantaged groups, impact on legal aid, and human rights impacts.

VALS' submission re Equal Opportunity

VALS' response to the request for input to the Equal Opportunity Review highlights the importance of systemic change particularly in relation to improved recognition of the importance of substantive equality and partnership and improved dialogue with key stakeholders. VALS argued that recommendations such as the following would be one step towards addressing a theme of the Attorney-General's Justice Statement, being the protection of rights and addressing of disadvantage.

VALS submission contained recommendations such as the following

1. Culture change: *Implement systemic change to the complaints system that results in an Indigenous paradigm or combination of Western based and Indigenous Australian paradigms*
2. Empower: *Continued commitment to empowerment of Indigenous Australians.*
3. Culturally inclusive: *Develop a culturally inclusive framework (ie: 'design in' opportunities for Koorie ideas etc) at the beginning of the policy development process.*
4. Team: *Provide a team of Indigenous Australians at the EOHRC in the following roles: outreach worker, investigator and conciliator.*
5. Draft framework: *Develop a draft framework (ie: Strategic Social Justice Approach) that contributes to dialogue between key stakeholders about how to make the legal system more accessible to Indigenous Australians.*

2. ALTERNATIVE DISPUTE RESOLUTION

To further extrapolate on the point made above VALS wishes to highlight an example of the inadequate planning around engaging with the community about Alternative Dispute Resolution (ADR). VALS is disappointed that the following processes are operating in isolation and not engaging with one another as this is counter-productive:

- Victorian Law Reform Committee review of civil law;
- Department of Justice review of the Equal Opportunity Act 1995;
- Department of Justice development of a Restorative Justice Framework;
- Victorian Parliament Law Reform Committee review of ADR.

VALS considers a focus on ADR to be positive, however, VALS wishes to air some reasons for caution and make some suggestions below. In order to develop substantive equality in the area

of ADR it is important that such resolution is targeted towards the needs of Indigenous Australians. An appropriate model of ADR is outlined below which includes Indigenous Australian input and choice. Also, the focus on ADR cannot be simply about cost savings in the administration of justice, but valuing ADR as a distinct entity ADR should not be in the shadow of the Courts, but community based. Also, the move away from an adversarial approach in recognition of the limitations is positive. However, this should not be at the expense of the role of lawyer as marginalised people particularly require legal support. Due to power imbalance there is need for an advocacy structure. Please see below some other cautions and suggestions that relate to substantive equality and Indigenous Australian input. Please note that the ADR model outlined below is inclusive of these themes, as well as the theme of choice.

Substantive equality

It cannot be assumed that a once size fits all approach to ADR will work for all. ADR should meet the needs of Indigenous Australians so should be targeted. ADR is also known as Appropriate Dispute Resolution. ADR should not only be appropriate in name, but in fact as it should be appropriate for diverse groups. VALS is aware of the needs of Indigenous Australians in the ADR context having prepared a submission for the Victorian Parliament Law Reform Committee review of Alternative Dispute Resolution and appeared at a Public Hearing.

The risk associated with not providing targeted ADR is that ADR will not meet the needs of Indigenous Australians. For instance, the requirement to go to mediation before filing going to Court in relation to family law matters acts as a barrier to Indigenous Australians using the family law system as the mediation provided is not culturally appropriate.

Indigenous Australian input

ADR reflects Western cultural values and alienates Indigenous Australians who have different cultural values and are consequentially disadvantaged by a power imbalance. According to Smith “the ability to decentre the Western worldview in order to understand Aboriginal ones is important to the ADR movement”¹ An example of different values of Western and Indigenous Australian culture relevant to mediation is that Indigenous Australians favour mediator’s personal involvement/first hand knowledge, whereas non-Indigenous Australians value the neutrality of a mediator.

VALS’ suggestions are influenced by Professor Larissa Behrendt, an Indigenous Australian lawyer and academic, who argues that despite the advantages of ADR it is still a problematic alternative for Indigenous Australians as it is a non-Indigenous Australian product that is incapable of addressing the power inequality created by racism and institutional discrimination.”²

The model that Professor Larissa Behrendt argues for:

- goes beyond merely transferring the dominant programs of ADR into the Aboriginal community with mediators who have had cultural training or Indigenous Australian mediators.³

¹ Victor Wenona, ‘Alternative Dispute Resolution (ADR) In Aboriginal Contexts: A Critical Review’ April 2007, page 24 as at http://www.chrc-ccdp.ca/pdf/adredd_en.pdf

² Behrendt Larissa, *Aboriginal Dispute Resolution: A Step Towards Self Determination and Community Autonomy*, Federation Press, 2005, p 70

³Ibid , p 6

- is one that is implemented by Indigenous Australians in their own communities, which recognise traditional cultural values and traditional structures of decision making.

The differences between Western and Indigenous Australian culture is apparent in the following table:

Indigenous Australian	Non-Indigenous Australian
Communal	Individual
Wholistic approach	Life as a divisible whole
Time spent on relationship building	Time spent on intensive negotiation
Mediator's personal involvement/first hand knowledge is valued	Mediator's neutrality valued.

Indigenous Australians in comparison to non-Indigenous Australians value flexible processes, people-orientation, use of cyclical time, and more qualitative measurements in assessing the success of the conflict resolution process.⁴

MODEL

The model of ADR that VALS prefers is as follows:

Choice

There should be a choice between mainstream and targeted ADR services, not simply an expectation that Indigenous Australians will use mainstream services.

Strategic Social Justice Approach

There should be strategic social justice approach to ADR that is adopted by this ADR review process, along with the civil justice review and Equal Opportunity Act to overcome the problem of these reviews operating in isolation. The strategy should prioritise systemic discrimination and I will now describe some ways this can be done.

Culturally inclusive framework

Include a culturally inclusive framework at the beginning of the policy development process rather than at the end. This means involving Indigenous Australians in the process and 'designing in' opportunities for Koorie ideas and values and being self reflective about western assumptions.

Create space for restorative justice

⁴ Victor Wenona, (2007) above n 1, page 11

A culturally inclusive framework may result in an ADR model for Indigenous Australians based on restorative justice. Restorative justice is closely related to Indigenous Australians forms of dispute resolution: ie victim-offender mediation which involves multiple parties.

Community Based

A model which creates space for community based ADR which is in a position to provide early intervention and is not in the shadow of the Courts. The model should be regional and could be based on the CLC model. This occurred in NSW which has Community Justice Centres that provide mediation. The ADR could even link in with the CLC model on an arms length basis because of the problem of conflict of interest.

Co-mediation

A co-mediation model which is favoured by Behrendt as she argues it will work for Indigenous Australian as they can have someone they can relate to in some way.⁵

Education

A model incorporating community education about ADR that is targeted at Indigenous Australians. For instance, Indigenous Australian specific publications which are noticeably so, such as Indigenous Australian colours and artwork. A model incorporating education of legal professionals improves referral process and information sharing between practitioners.

Safeguard: Legal Advice/power imbalance

A model that ensures that prior to using ADR all parties get clear legal advice about the scope of the ADR process that they are engaging in and their rights in terms of withdrawing from the process, especially if ADR is mandatory and there is a significant power imbalance (ie: family violence).

Triage

Where the dispute involves a matter of some urgency (eg: impinging on welfare of child) there should be a fast tracking option to the Courts. This would encourage the party not engaging in negotiation to do so and be useful in addressing welfare issues for the child quickly.

3. RESTORATIVE JUSTICE

VALS argues that in order to develop substantive equality in the area of alternative dispute resolution it is important that such resolution is targeted towards the needs of Indigenous Australians. An appropriate model of ADR is provided which includes Indigenous Australian input and choice.

VALS is concerned by the powerpoint presentation on the Justice Statement delivered on 29 April 2008. The powerpoint only mentions restorative justice in relation to victims. VALS considers that the scope and value of restorative justice goes beyond victims. It is also relevant to offenders, support people and the Indigenous Australian community. Also, restorative Justice

⁵ Behrendt Larissa (2005) above n2, page 63

should be available to adults, not just juveniles. The Koori Court is an example of restorative justice working effectively for adults as recidivism rates are low.

‘smart on crime’

VALS argues that there is potential to expand existing restorative justice options so that the needs of Indigenous Australians are better met and this is a ‘smart on crime’ approach.

Aboriginal Family Decision Making

There is opportunity to further expand the successful practice of Aboriginal Family Decision Making. It is used in the context of child protection and process involves the Department of Human Services, the Indigenous Australian family and community to work out a solution. The limitation of this model is that it is only applicable at crisis point when a child protection notification has been made to the Department of Human Services. There is potential to extend this model to allow for early intervention. It is inappropriate that the limited application of restorative justice to the tertiary end of the child protection system for Indigenous Australians is inappropriate. Such limited application of restorative justice is not the case for non-Indigenous Australians as early intervention is available. VALS is disappointed that the Justice Agreement as outlined at the CLC meeting does not appear to prioritise prevention or early intervention.

Family violence

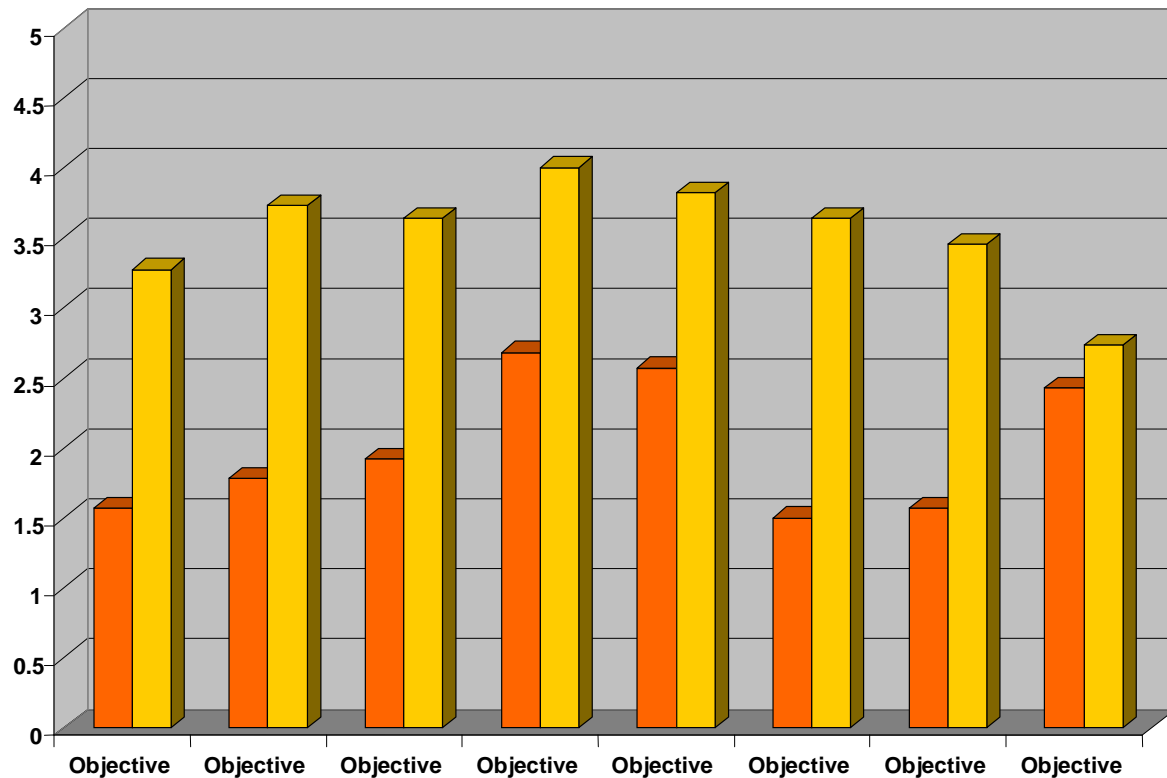
There is potential to expand the Koori Court further beyond recent roll out of the Koori Court (see above) A Koori Court Elder, who was a participant of research (Bluett-Boyd 2005) that VALS commissioned about applying restorative justice to the family violence context stated: “We have proven that we can take care of ourselves. Look at the Koori Court. They say domestic violence is different, that it’s too serious. Well, what does that say to us? Violence is violence no matter which way you cut it. We know how to deal with that. We can cope”

The research found that the notion of restorative justice as a community-based mediation process appealed to the majority of the participants. The research participants were given this list of objectives and asked to rank them and they did this as follows.

Objective 1: Putting an end to violence	1
Objective 2: Preventing further violence for an individual victim through changing the offenders behaviour	2
Objective 3: Punishing and holding the offender accountable for their violence	5
Objective 4: Sending a message to the community that domestic and family violence is wrong in the hope of altering the attitudes and behaviour of community members	3
Objective 5: Supporting the victims by validating their stories and experiences	4

Objective 6: Repairing the relationship between the victim and offender	6
Objective 7: Repairing the relationship between the offender and the community	7
Objective 8: Compensation to the victim	8

The only difference between the way Bluett-Boyd ranked the objectives and the way the participants ranked them is in objectives 3-5. The participants considered that the restorative justice response was more effective at meeting all objectives. The research provides reasons for this ranking of priorities and why restorative justice was seen to comply with the priorities to a greater extent than the criminal justice system. This graph represents how the restorative justice system in yellow and the criminal justice system in orange fare in meeting the objectives. The restorative justice system meets the objectives to a greater extent than the criminal justice system.



Indigenous Australians prefer a restorative justice response because it is a ‘smart on crime’ approach as opposed to a tough on crime approach which is what the criminal justice system advocates. Characteristics of a ‘smart on crime’ approach are that it strikes a better balance between the extreme poles outlined below:

- **Cultural appropriate v culturally alienating:** Indigenous Australians prefer a restorative justice approach because it is considered more culturally appropriate than the culturally alienating western legal system.

- **Balance between agency and accountability:** A restorative justice model provides a better balance between agency and accountability of family violence perpetrators than a criminal justice response.
- **Victim validated versus victim ignored:** When it comes to treatment of victims Indigenous Australians prefer the restorative justice process which validates a victim's experience, whereas the criminal justice system ignores the victim.
- **Punishment versus rehabilitation (healing):** Indigenous Australians consider the balance between punishment and rehabilitation to be better struck in the restorative justice context as opposed to the criminal justice context. Bluett-Boyd found Indigenous Australians emphasise healing and consider restorative justice to have great potential for healing.
- **Holistic versus silo approach:** Indigenous Australians prefer a restorative justice approach over a criminal justice approach because it provides a holistic approach as opposed to a silo approach. The community is involved and services are involved to consider holistic approaches that address the entirety of an individual's problems

Restorative Justice is threatened by certain arguments that VALS is critical of as VALS advocates for creation of space for restorative justice and such arguments threaten the creation of this space:

The threats to restorative justice are:

1. A tough on crime approach which interprets restorative justice to be a soft approach and hence overlooks it.
2. Failure to analyse the shortcoming of the tough on crime approach.
3. Restorative justice being put on the backburner as something that requires further research before progress can be made.
4. Restorative justice being feared as an unknown entity, especially as restorative justice requires flexibility and a local response.

VALS argues there are weaknesses to above threats. VALS has highlighted that the criminal justice approach is failing Indigenous Australians and that a restorative justice approach is preferred. VALS adds that to counteract the monopoly of the tough on crime approach on people's consciousness there should be a culture change strategy to challenge punitiveness that involves educating the general community and media.

It should be highlighted that the tough on crime sentiment is unhelpful and provide good news stories about restorative justice. The call for research is flawed as research exists. Repeated calls for research ignores the catch twenty two situation whereby development of restorative justice options depends on research, but research depends on the existence of restorative justice programs in order to analyse them.

In conclusion, VALS argues that that the strengths of restorative justice are more compelling than the weaknesses which means that space should be created for restorative justice options in the family violence context in appropriate circumstances. The reason space should be created for a restorative justice response is because the family violence legal system is in many respects failing Indigenous Australians. Restorative justice is in a position to respond to the distinct characteristics of Indigenous Australian's experience of family violence.



Whilst VALS can identify many opportunities for restorative justice in the Indigenous Australian community it is met with the barrier of threats to a space for restorative justice. The primacy given to a punitive tough on crime approach leads to restorative justice being discounted as soft on crime approach. Restorative justice is feared as an unknown entity. VALS argues that these threats are unfounded and that restorative justice is a “smart on crime” approach and space for it should be legitimised. VALS is at pains to stress this stance does not equate to decriminalising family violence, but it is about creating choice for Indigenous Australians.

4. MODERNISING JUSTICE: DE-CRIMINALISATION OF PUBLIC DRUNKENNESS

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VALS suggests that justice could be modernised by reforming criminal law to decriminalise public drunkenness. VALS’ stance on public drunkenness laws is as follows:

- public drunkenness should be decriminalised and treated as a public health issue.
- there are factors standing in the way of decriminalisation happening in Victoria and the Justice Statement must address them. One of the factors is that despite a public statement by Attorney-General, Mr Rob Hulls, decriminalisation of public drunkenness is on the Government’s agenda, there has been no action.

In the interests of modernising justice and achieving substantive equality, the Justice Statement should have a role to play in decriminalising public drunkenness. Public drunkenness laws disproportionately affect Indigenous Australians in a negative manner and are out of date. VALS urges the Attorney-General to ensure that the Justice Statement reflects his public statement that decriminalisation of public drunkenness is on the Government's agenda.⁶ Until this occurs there are barriers standing in the way of decriminalisation.

Substantive equality

Reasons to decriminalise

VALS argues that change is required in Victoria as it is “the only state in Australia where being drunk in a public place is of itself a criminal offence and where police do not have access to designated places of safety for holding drunks”.⁷ VALS is critical of Victoria for lagging behind other jurisdictions

Public drunkenness should be decriminalised because of Victorian Indigenous Australian’s negative experience of public drunkenness as a criminal issue. VALS will provide case scenarios on the following topics which summarise the inappropriateness of the law of public drunkenness:

- Over-policing of public drunkenness.

⁶ Anonymous, *Public Drunkenness, while ugly, should not be a crime* (3 May 2007) The Age http://tertiary.theage.com.au/bmentry_view.asp?intid=43

⁷ Office of Police Integrity and Ombudsman Victoria, *Conditions for Persons in Custody* (July 2006), Office of Police Integrity, page 18 http://www.opi.vic.gov.au/resources/documents/Conditions_for_persons_in_custody.pdf as at 29 April 2008

- Public drunkenness is a ‘gateway’ to further charges being laid and entrenchment in the criminal justice system.
- Lack of holistic facilities

There is merit in decriminalising public drunkenness and treating public drunkenness as a public health issue which is the case in some Australian jurisdictions. It makes more sense that police deal with public drunkenness as a safety and social welfare issue and consequently use the least restrictive option in dealing with people.

Decriminalisation of public drunkenness has not occurred in Victoria to date due to calls for decriminalisation of public drunkenness falling on deaf ears, attempts to decriminalise public drunkenness being thwarted and there has been inaction following statements that decriminalisation is on the Government’s agenda.

Disproportionate impact

Indigenous Australian’s experience of public drunkenness laws which is arguably directly or indirectly discriminatory; The offence of public drunkenness disproportionately affects Indigenous Australians. In 1991, drunkenness cases accounted for 57% of Aboriginal custodies compared with 27% of non-Aboriginal custodies.⁸ More than half (67%) of the Aboriginal deaths in custody investigated by the RCIADIC were related to arrests due to public drunkenness.⁹ 23.6% per cent of Aboriginal arrests in 1995/96 were for public drunkenness.¹⁰

The reason for the high incidence of public drunkenness arrests of Indigenous Australians needs to be questioned in light of the fact that there is not a significant difference in drinking trends between Indigenous Australian and non-Indigenous Australian. 15% of the former engage in drinking at risky or high risk levels compared with 14% for the latter (National Aboriginal and Torres Strait Islander Health Survey of 2004-05).¹¹

Arguably the disproportionate impact of public drunkenness law on Indigenous Australians is a result of indirect or direct discrimination. The disproportionate impact on the law can be attributed to the fact that Indigenous Australians use public space as ‘cultural space’ more often than non-Indigenous Australians. Additionally, race and low socio-economic status both contribute to Indigenous Australians being highly visible to police which results in over-policing.

Case Scenarios

1. Over-policing of public drunkenness.
 - a. *A man was released from a police cell after being arrested for public drunkenness. He was then arrested for public drunkenness again whilst on his way home.*

⁸Royal Commission into Aboriginal Deaths in Custody (1991) Volume 2 paragraph 21.1.2

⁹ Victorian Aboriginal Legal Service Co-operative Limited ‘Response To Scrutiny Of Acts And Regulations Committee’s Inquiry Into ‘Discrimination In The Law’ (June 2004)

¹⁰ Victorian Parliamentary Drugs and Crime Prevention Committee *Inquiry into Public Drunkenness Final Report* (2001) , page 64, Victorian Parliamentary Drugs and Crime Prevention Committee, http://www.parliament.vic.gov.au/dcpc/Reports%20in%20PDF/Drunkenness_final_report.pdf as at 28 April 2008

¹¹ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Health Survey 2004-2005* (2006) Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/C36E019CD56EDE1FCA256C76007A9D36> as at 29 April 2008

b. Police were called to a neighbourhood dispute and used capsicum spray on an Indigenous Australian in his backyard. Whilst showering in his home to remove the capsicum spray he had an asthma attack. He called out from the window of the house to police officers at the front of the house that he needed an ambulance. They told him that an ambulance had been called and to stay put. The man went out to the front of his house and was tackled to the ground and arrested for public drunkenness.

c. A man had an argument with his brother and sat outside the front of his house to cool off and was arrested for public drunkenness. His feet were in the gutter and his bottom was on his own property.

2. Public drunkenness is a gateway to further charges being laid and entrenchment in the criminal justice system.

a. An Indigenous Australian is arrested for public drunkenness and placed on bail on his own undertaking. He fails to attend Court and is charged with breaching bail. A warrant is issued for his arrest.

b. A man is outside a pub after drinking there and is arrested. The police arrest him for public drunkenness and he challenges his arrest. He is also charged with resist arrest and assault police.

The policing of public drunkenness law can lead to additional charges being laid at the point of arrest. Arrest for public drunkenness can often be the trigger for discussion with the police about the merits of the charge. This leads to further charges being made. Some charges that Indigenous Australians receive in combination with being drunk in a public place are: use threatening words, offensive language, indecent language, resist arrest, assault police or criminal damage. Public drunkenness, in combination with two other charges, is known within the Koorie community as the 'trifecta' or 'ham, cheese and tomato'.

3. Lack of holistic facilities

An Indigenous Australian was continually being picked up for public drunkenness and criminal damage offences. The police used the [Alcoholics and Drug-Dependent Persons Act 1968 \(Vic\)](#) which involves assessment for rehabilitation. Even though the individual was assessed as eligible for rehabilitation there was nowhere for him to go so he ended up in the police cells for 6 weeks in total.

Other reasons to decriminalise public drunkenness are:

- In light of the ineffectiveness of the law relating to public drunkenness, and the potential for abuse of the law, the offence should be abolished in Victoria.
- Decriminalisation would reduce the rate of people being locked up in police cells;
- Decriminalisation would reduce the risk of deaths in custody;
- Criminalisation does not operate as a deterrent against acts of further public drunkenness.
- Public drunkenness law is decades past its use by date.

Past Public Drunkenness inquiries in Victoria recommending decriminalisation

In Victoria there has been a multitude of inquiries in relation to public drunkenness that have considered arguments for decriminalisation of public drunkenness. The following Reports have recommended decriminalisation of the offence, especially in light of the needs of Indigenous Australians.

VALS argues that the Victorian Government should take notice of these recommendations and not ignore them so that it is no longer a crime to be drunk in a public place. Decriminalisation of public drunkenness would involve repealing the following sections of the Summary Offences Act: 13, 14, and 16(a) 1966.¹²

The following inquiries recommend the decriminalisation of public drunkenness and provide ample evidence about the merits of decriminalisation of public drunkenness:

- *Royal Commission into Aboriginal Deaths in Custody (RCIADIC) Report* (1991).
- Victorian Law Reform Commission, *Public Drunkenness – Report 25* (1989).
- Victorian Law Reform Commission, *Public Drunkenness – Supplementary Report 32* (1990).
- *Public Drunkenness (Decriminalisation) Bill 1990 (Vic)*. This Bill would have created a situation in Victorian similar to that in New South Wales. The proposed model was to: grant police the power to release the person into the custody of another person able and willing to take responsibility for the intoxicated person. It was also envisaged that a duty of care would be imposed on police and those in charge of sobering up Centres to provide medical attention for intoxicated persons who appeared to be in need of it.
- Victorian Parliamentary Drugs and Crime Prevention Committee Report titled *Inquiry into Public Drunkenness Final Report* (2001).¹³ The Committee was required via its terms of reference to have regard to the RCIADIC when reviewing public drunkenness laws. The Report concludes: “...whilst public drunkenness is by no means a problem that only concerns Indigenous Australians, public drunkenness offences do have a disproportionate impact upon Indigenous Australian peoples. The Drugs and Crime Prevention Committee hopes that this Report will result in “the recommendations of the Royal Commission into Aboriginal Deaths in Custody finally being realised.”¹⁴
- Victorian Parliamentary Drugs and Crime Prevention Committee Report titled *Inquiry into strategies to Reduce Harmful Alcohol Consumption Discussion Final Report* (2004).
- *Conditions for Persons in Custody Report of the Office of Police Integrity and Ombudsman Victoria* (July 2006).
- *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (2005).

Arguments for a Public Health Response

According to the Office of Police Integrity and Ombudsman Victoria in a report about custody “Victoria is the only state in Australia where being drunk in a public place is of itself a criminal offence and where police do not have access to designated places of safety for holding drunks”.¹⁵ VALS prefers the situation in jurisdictions where the apprehension and detention of intoxicated

¹² Victorian Parliamentary Drugs and Crime Prevention Committee (2001) above n 10

¹³ Ibid

¹⁴ Ibid, page x

¹⁵ Office of Police Integrity and Ombudsman Victoria *Conditions for Persons In Custody* (July 2006) page 18 http://www.opi.vic.gov.au/resources/documents/Conditions_for_persons_in_custody.pdf as at 28 April 2008

persons is only justified in more qualified circumstances (ie: South Australia, New South Wales ‘NSW’ and Australian Capital Territory).

VALS will concentrate on the example of NSW which has decriminalised public drunkenness arguably in recognition of the fact that public drunkenness is not a criminal issue, but a public health issue. VALS is critical of Victoria for lagging behind in this recognition.

The Office of Police Integrity and Ombudsman Victoria report advocates for treating public drunkenness not as a legal problem but as a public health, medical or social welfare problem.¹⁶ It states “[i]ntoxicated persons are a danger to themselves and to others and accommodating them in unsuitable police cells, rather than taking them to health care facilities and sobering up centres with properly trained staff, puts them and their jailers at risk.”¹⁷

In NSW legislation (*Intoxicated Persons Act 1979*) decriminalizing public drunkenness was passed in 1980 and the Act was subsequently amended (*Intoxicated Persons Act 2000*). The amendments “reflect a change in emphasis, whereby primacy is given to placing the intoxicated person in the hands of the *responsible person*; making provisions for the health and welfare of the intoxicated person whilst in custody; and generally simplifying some of the definitional sections of the Act”.¹⁸

In NSW, treating public drunkenness as a public health issues means using arrest as a last resort and instead handing the intoxicated person to a responsible person. Also police are required to “...provide immediate assistance to ensure Aboriginal people are put in contact with the support structures available, to enable them to regain well being and physical wholeness”, such as an Aboriginal Community Justice Panel.”¹⁹ In NSW, there is a Protocol between the Department of Community Services, NSW Police Service and NSW Health for the provision of services to homeless people who are affected or addicted to alcohol and other drugs. The Protocol has been developed as a holistic case management approach to administering and providing services to homeless persons.²⁰

Barriers to Decriminalisation

The barriers to the decriminalisation of public drunkenness laws in Victoria in the past have been:

- Concerns that there would be inadequate provision of sobering-up centres for Indigenous and non-Indigenous people in Victoria.²¹ Many of the recommendations to decriminalise public drunkenness in inquiries and reports go further and state that the decriminalisation of public drunkenness should be subject to provision of appropriate services (ie: RCIADIC, Victorian Parliamentary Drugs and Crime Prevention Committee Report 2004). Some in Government and non-Government organisations have used the lack of such services as a peg to hang their hat on to argue that public drunkenness should not be decriminalised, or at least not yet.

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ Victorian Parliamentary Drugs and Crime Prevention Committee (2001) above n 10, page 205

¹⁹ *Ibid*, page 111

²⁰ *Ibid* 209

²¹ Victorian Parliamentary Drugs and Crime Prevention Committee (2001) above n 10

- Reasons for opposition to the Public Drunkenness (Decriminalisation) Bill 1990 (Vic) in 1991 by the Upper House as follows:
 - police opposition;
 - local council opposition;
 - poor consultation between State and local government levels;
 - lack of council debate;
 - a perceived conflict between public drunkenness decriminalisation and the continuing existence of the public drinking local laws).²²

Victorians now find themselves in a new era when it comes to public drunkenness as the current Attorney-General, Mr Rob Hulls, has shown leadership on the issue of public drunkenness. Mr Hulls has publically stated that decriminalisation of public drunkenness is on the Government's agenda.²³ However, Victorians are still waiting for this statement to be actioned as the Government is not prioritising decriminalisation of public drunkenness. This inaction is a barrier to the decriminalisation of public drunkenness.

Decriminalisation of public drunkenness – Moving Forward in Victoria

VALS' response to opposition to decriminalizing public drunkenness is to continue to advocate for the decriminalisation of public drunkenness. VALS is continuing to advocate for the decriminalisation of public drunkenness in order to prompt the Government into action to decriminalise public drunkenness. The manner in which VALS is advocating for the cause of decriminalisation of public drunkenness is to:

- Call for decriminalisation in relevant submissions
- Include in submissions a common argument that a 'tough on crime approach', which results in a proliferation of laws and punitiveness is inappropriate. Instead a 'smart' approach is required. In the case of public drunkenness it would be smart to treat it as a public health issue.
- Writing articles for the media, such as a media release titled *Decriminalising public drunkenness is well overdue* (11 May 2007). The media release states that 16 years after the RCIADIC "...it is still an offence to be drunk in a public place in Victoria. Not for being drunk and disorderly, abusive or disruptive, but simply being drunk in public. Despite some initiatives to address overrepresentation of Koories in the justice system decriminalising public drunkenness is well overdue".

In conclusion public drunkenness should be decriminalised due to Victorian Indigenous Australian's negative experience of public drunkenness as a criminal issue. Public drunkenness laws arguably directly or indirectly discriminate against Indigenous Australians. The inappropriateness of public drunkenness laws is apparent in case scenarios such as the following which point to over-policing: *A man was released from a police cell after being arrested for public drunkenness. He was then arrested for public drunkenness again whilst on his way home.* VALS provided other case scenarios that pointed to the fact that public drunkenness law is a

²² Ibid page 30

²³ Anonymous, *Public Drunkenness, while ugly, should not be a crime* (3 May 2007) The Age http://tertiary.theage.com.au/bmentry_view.asp?intid=43

gateway to further entrenchment in the criminal justice system and there is a lack of holistic facilities.

There is merit in decriminalising public drunkenness and treating it as a public health issue which is the case in New South Wales where the intoxicated person is placed in the hands of a responsible person. It makes more sense to that police deal with public drunkenness as a safety and social welfare issue and consequently use the least restrictive option in dealing with people.

Despite the existence of a multitude of reports that recommended decriminalisation of public drunkenness the recommendation has either fallen on deaf ears, attempts to implement the recommendation have been thwarted or there has been inaction following statements that decriminalisation is on the Government's agenda. Despite the following public drunkenness laws in Victoria remain:

- introduction in Parliament of the Public Drunkenness (Decriminalisation) Bill 1990 (Vic).
- public statement by Attorney-General, Mr Rob Hulls, that decriminalisation of public drunkenness is on the Government's agenda

Public drunkenness laws remain because the Bill was defeated in 1991 due to opposition by police and local council and lack of consultation between State and local government levels. Also, the Government is not prioritising decriminalisation of public drunkenness.

VALS' response to opposition to the decriminalisation of public drunkenness is to be critical of Victoria for lagging behind other jurisdictions that have decriminalised public drunkenness. Also, VALS will continue to advocate for the decriminalisation of public drunkenness, such as in submissions and media releases. In order to move forward on the issue of public drunkenness in Victoria VALS is endeavoring to continually relay messages such as the following:

- A 'tough on crime' approach is inappropriate and a smart approach is preferable, namely treating public drunkenness as a public health issue.
- decriminalising public drunkenness is well overdue.

CONCLUSION

This submission contains the following themes:

- **Substantive equality**: there is a difference between formal and substantive equality as the former assumes everyone is equal and the latter does not and so positively leads to affirmative action.
- **Choice**: there is need for both specific Indigenous Australian services and mainstream services.
- **'smart on crime'**: this approach is more appropriate given the shortcomings of a tough on crime approach. A 'smart on crime' recognises these shortcomings and tries to address them.
- **Indigenous Australian input/dialogue**: there is need to utilise Indigenous Australian knowledge in the development of the justice system.

VALS applies the themes of VALS' submissions listed above to the following themes of the Justice Statement that were mentioned at the Community Legal Centre meeting on 28th April 2008 with the Attorney-General Mr Rob Hulls.

1. **Community Engagement:**

VALS argues that in order to achieve community engagement there is need for affirmative actions motivated by substantive equality, such as the Koori Court. VALS argues that all Indigenous Australians should have choice and so have access to measures that attempt to achieve substantive equality. Also, VALS argues that recognition of the value of Indigenous Australian input and the consequential dialogue with Indigenous Australian is an example of a way to achieve substantive equality and community engagement. A means of achieving this is to develop partnerships with Indigenous Australians, such as Indigenous Australian input on a Government consultation strategy that achieves consolidation of consultation processes.

2. **Alternative Dispute Resolution:**

VALS argues that in order to develop substantive equality in the area of alternative dispute resolution it is important that such resolution is targeted towards the needs of Indigenous Australians. An appropriate model of ADR is provided which includes Indigenous Australian input and choice.

3. **Restorative Justice:**

VALS argues that restorative justice does have a role to play in the Justice Statement. VALS' preference for restorative justice is in recognition of the fact that it provides a 'smart on crime' approach. VALS provides details of restorative justice in the context of family violence from research that VALS commissioned. VALS considers that the scope and value of restorative justice goes beyond victims and is concerned that this recognition was not evident in the presentation made on 28th April 2008.

4. **Modernising Justice: De-criminalisation of Public Drunkenness:**

VALS argues that Modernising justice does have a role to play in the Justice Statement. Justice should be modernised by reforming criminal law to decriminalise public drunkenness in the interests of achieving substantive equality. Public drunkenness law disproportionately affects Indigenous Australians in a negative manner and is out of date. VALS urges the Attorney-General to ensure that the Justice Statement reflects his public statement that decriminalisation of public drunkenness is on the Government's agenda.²⁴ Until this occurs there are barriers standing in the way of decriminalisation.

²⁴ ibid

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